

## Tilburg University

### Globalisation, crime and governance

de Hert, Paul

*Published in:*  
Transitional justice and its public spheres

*Publication date:*  
2017

*Document Version*  
Publisher's PDF, also known as Version of record

[Link to publication in Tilburg University Research Portal](#)

*Citation for published version (APA):*  
de Hert, P. (2017). Globalisation, crime and governance: Transparency, accountability and participation as principles for global criminal law. In C. Brants, & S. Karstedt (Eds.), *Transitional justice and its public spheres: Engagement, legitimacy and contestation* (pp. 91-124). Hart Publishing.

#### General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal

#### Take down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

## 5

# *Globalisation, Crime and Governance*

## Transparency, Accountability and Participation as Principles for Global Criminal Law

PAUL DE HERT<sup>1</sup>

### I. INTRODUCTION

THE AIM OF this chapter is to look for analytical tools at an abstract level to help further the debate on the many legal and practical issues besetting the public spheres of transitional and international criminal justice. To that end, I propose a *global criminal law* perspective, encompassing both transitional justice and international criminal law *and* transnational criminal law, and inquire into the principles that could guide us. Can we simply apply domestic principles of criminal law and criminal justice at the trans-state level? Admittedly, a theoretical framework developed for sovereign states can be adapted to an interstate context. Yet, the inherent weaknesses of the modern principled approach to criminal law remain—for instance, the lack of an empirical basis, and of respect in practice, for the use of the harm criterion or the *ultima ratio* principle. The result is a certain cynicism regarding the actual capacity of modern criminal law principles to steer legislative and judicial developments.

I suggest looking elsewhere when discussing how to govern and implement *global* criminal justice and advocate a procedural approach, relying on two theoretical frameworks. The first was proposed by Brants, Mevis and Prakken in 2001, and looks to procedurally oriented principles to address criminal justice issues, in particular transparency, accountability

<sup>1</sup> The author would like to thank Irene Wieczorek, Mathias Holvoet and the two editors for their encouragement and help.

and participation. The second is also a call for a procedural approach but launched in the context of the Global Administrative Law project and the debate on global constitutionalism. Can these two approaches be connected? What are their limits and possibilities for global criminal justice and their application for global criminal law? Finally, how do they interrelate and could they provide a way forward in terms of a methodology to judge their application in each and every single case, given the many insights on this to be found in governance literature?

## II. WHAT IS GLOBAL CRIMINAL LAW?

The traditional presentation of the institutions, norms and crimes, processes and personnel of international criminal law always puzzles me, a legal theorist. It is simply too state-centred, too much based on old intuitions and seemingly oblivious to today's conversation about criminal law in a global era<sup>2</sup> that moves beyond *international* crimes, criminals and courts. Let us review some of the basic facts. International criminal law focuses on *core* crimes (genocide, war crimes, crimes against humanities and aggression). But why are these *core* crimes? Why the predicate 'core' in light of their ever-expanding scope? Should the mandate of international criminal tribunals be extended to, for instance, terrorism; do we simply admit that the core has grown too? Again, what is this the core *of*? The discussion lacks context and perspective, losing sight of crimes equally blameworthy as those belonging to this alleged 'core', and strongly related to globalisation, such as the trafficking of human beings, transnational corruption or online fraud.

Neil Boister has tried to save the concept of international criminal law by distinguishing between *International Criminal Law Stricto Sensu* and *Transnational Criminal Law*,<sup>3</sup> the latter being a legal counterpart to 'transnational crimes' resulting from the negative externalities associated with the liberalised movement of persons, products and services.<sup>4</sup> Boister's theoretical defence of the distinction between the two systems qua substance, mode of development and overall policy goals has not met with enthusiasm,<sup>5</sup> but at least he creates a window on criminal law in a global era.

<sup>2</sup> For a definition of globalisation (as a phenomenon of increasing interconnectedness of societies) and a discussion of alternative definitions, see KF Aas, *Globalization and Crime* (Los Angeles, Sage, 2007) 3–6.

<sup>3</sup> N Boister, *An Introduction to Transnational Criminal Law* (Oxford, Oxford University Press, 2012) 13 and 18.

<sup>4</sup> See P Kotiswaran and N Palmer, 'Rethinking the "International Law of Crime": Provocations from Transnational Legal Studies' (2015) 6(1) *Transnational Legal Theory* 55, 56. See also N Boister, 'Reflections on the Concept of Transnational Criminal Law' (2015) 6(1) *Transnational Legal Theory* 9.

<sup>5</sup> See Kotiswaran and Palmer, 'Rethinking' (2015) 55–88.

However, even in Boister's approach, the perspective is still inspired by traditional international law. He defines *Transnational Criminal Law* as 'the indirect suppression by international law through domestic penal law of criminal activities that have actual or potential trans-border effects',<sup>6</sup> a definition that explains why the bulk of his book concerns *not* today's crimes, victims, criminals and stakeholders of globalisation, but those selected crimes that are the object of bilateral and multilateral conventions between states and international organisations. I am still waiting for the first convention incriminating atrocities against illegal migrants or the starvation of populations due to neoliberal economic reform plans. These 'crimes that are not crimes' should be the object of a conversation about criminal law in a global era, but are absent in the legalistic contours of the *Transnational Criminal Law* project.

Particularly missing is a complete description of the real actors of globalisation. Understanding the importance of new and non-state actors is a central tenet in the booming literature on what is called *Global Law*.<sup>7</sup> In today's setting, several players claim authority to control a given legal situation, and a single act or actor is potentially regulated by multiple legal or quasi-legal regimes.<sup>8</sup> Gone are the simple schemes with autonomous, territorially distinct spheres, where activities and actors fall under the legal jurisdiction of one single regime at a time.<sup>9</sup> Bernam labels the new landscape as one of jurisdictional hybridity, where there is confusion and conflict about what norms are applicable. Possible alternative labels are *multi-layeredness* and *fragmentation*.

The fascinating example that comes to mind are the hybrid or internationalised criminal tribunals, such as the Extraordinary Chambers in the Courts of Cambodia, the Special Court for Sierra Leone, the Special Panels for Serious Crimes in Timor, the 'Regulation 64' Panels in Kosovo, the War Crimes Chamber in Bosnia and Herzegovina and the Special Tribunal for Lebanon. These courts illustrate the *multi-layeredness* central to global law understanding: their institutional set-up and applicable law is a blend of international and domestic law. Going beyond these new forms of international criminal justice mechanisms that are still relatively traditional (they are 'courts' after all!) are actors such as the United Nations (UN) Security Council, human rights non-governmental organisations (NGOs), recognised international and national media, newcomers such as WikiLeaks and so forth. All play an important role in today's discussion on criminal law in a global era. Amnesty International's recent policy change in favour of

<sup>6</sup> Boister, *An Introduction* (2012) 13 and 18.

<sup>7</sup> See N Walker, *Intimations of Global Law* (Cambridge, Cambridge University Press, 2015).

<sup>8</sup> PS Berman, *Global Legal Pluralism: A Jurisprudence of Law beyond Borders* (New York, Cambridge University Press, 2012) 4.

<sup>9</sup> *ibid* 4.

decriminalising consensual adult sex work worldwide is a case in point and changes the role of the organisation in setting policies. The same can be said of the critics (some of them famous Hollywood stars) who disagree with Amnesty's new policy with arguments about the evil of human trafficking behind the sex work industry.<sup>10</sup> And our traditional understanding of international criminal justice certainly fails to capture official unilateral policies, beyond established mechanisms of accountability, by individual states: the US and Israel on extrajudicial killings of suspected persons, for example,<sup>11</sup> or Belgium on obtaining data stored by providers in other countries.<sup>12</sup>

The global law lens can help us ask relevant and new questions: how can we identify and assess the impact of old and new actors in the international and transnational landscape? Does conceiving of certain activities, such as environmentally harmful activities, rights abuses that are a product of global trade or corruption as global rather than international crime, allow us more insight into the nature of, or solutions to, particularly thorny or heinous problems? Can we understand local responses to the blunt end of transnationally driven crimes better by examining them through a global law lens? Have the forces of globalisation, simultaneously drawing us closer together by making the globe smaller yet increasing fragmentation between normative orders, created new types of criminals, operating in a (legal) space that is not national, international or transnational? Do such criminals create new types of victims, whose sufferings engender claims that cannot be adequately addressed by the existing frameworks of criminal law? Are there (criminal) justice claims or responses that are 'global'? Perhaps the response to certain crimes, such as corruption, is necessarily global? Can we observe a 'global criminal law' apart from and beyond the institutions, norms, processes and personnel of international criminal law? How does global criminal law relate to existing institutions or is it non-institutional by nature?

It is fair to say that these questions perfectly fit the project or paradigm of transitional justice,<sup>13</sup> with its eye for the multiplicity of actors and mechanisms involved in post-conflict situations. But the label of *global criminal*

<sup>10</sup> See J Neuwirth, 'Amnesty International Says Prostitution is a Human Right—But it's Wrong', *The Guardian* (29 July 2015), [www.theguardian.com/sustainable-business/2015/jul/28/amnesty-international-prostitution-sex-work-human-trafficking](http://www.theguardian.com/sustainable-business/2015/jul/28/amnesty-international-prostitution-sex-work-human-trafficking). See also N Grimley, 'Amnesty International Row: Should Prostitution be Decriminalised?', *BBC News* (11 August 2015), <http://www.bbc.com/news/world-33850749>.

<sup>11</sup> O Kessler and W Werner, 'Extrajudicial Killing as Risk Management' (2008) 39(2–3) *Security Dialogue* 289.

<sup>12</sup> P De Hert and M Kopcheva, 'International Mutual Legal Assistance in Criminal Law Made Redundant: A Comment on the Belgian Yahoo! Case' (2011) 27(3) *Computer Law & Security Review* 291. See also Boister (n 3) on 'norm entrepreneurialism', by which (usually powerful) states export their domestic criminal laws into the international realm.

<sup>13</sup> Compare with the short discussions of this 'paradigm' by B Kotecha, 'Book Review of Alison Bisset, *Truth Commissions and Criminal Courts* (Cambridge University Press, 2014)' (2015) 3 *Journal of International Criminal Justice* 409–18.

law allows us to go beyond these post-conflict situations, which are only part of what is going on, and to focus on all criminal law developments related to international criminal law and globalisation.<sup>14</sup> The question is what principles or general criteria should govern or frame it?

### III. WHY PRINCIPLES IN CRIMINAL LAW?

Criminal law can be either conceived as a mere instrument at the service of effective law and (cross-border) crime control or, conversely, as a special field deserving special care because of its particularly invasive character. Attempts to identify this ‘special field’ often aim to protect criminal law from inflated instrumental use as a policy tool that can be used in all possible situations, even in those where the link with traditional criminal law logic is weak. Principles play a primordial role here,<sup>15</sup> as they do in global law scholarship.<sup>16</sup> Horder calls these voices a ‘counterreformation’ in criminal law scholarship,<sup>17</sup> advocating the return to general basic principles: the use of criminal law should be restricted to serious kinds of wrongdoing and criminalisation to wrongdoing accompanied by fault—preferably wrong actions rather than culpable omissions; or the onus of proof should rest with the state.

The call for principles also forms part of significant criticism of attempts to harmonise substantive criminal law by the EU.<sup>18</sup> A 2009 *Manifesto on European Criminal Policy* enumerates relevant principles that should guide EU substantive criminal law:<sup>19</sup> four criteria concerning in the selection of behaviour deserving criminal punishment are the principle of legitimate interest, the principle of *ultima ratio*, the principle of coherence and the

<sup>14</sup> To my knowledge, the term *Global Criminal Law* first appears in O Höffe, *Democracy in an Age of Globalisation* (Dordrecht, Springer, 2007) 262–68.

<sup>15</sup> See, eg, A Ashworth, ‘Is the Criminal Law a Lost Cause?’ (2000) 116 *Law Quarterly Review* 225–56; D Husak, *Over-criminalisation* (Oxford, Oxford University Press, 2008); RA Duff, *Answering for Crime* (Oxford, Hart Publishing, 2007); AP Simester and A von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Oxford, Hart Publishing, 2011).

<sup>16</sup> On the advantages of identifying, working and adopting of legal principles, see A von Bogdandy, ‘Constitutional Principles’ in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (2006, Oxford, Hart Publishing); K Lenaerts and JA Gutiérrez-Fons, ‘The Constitutional Allocation of Powers and General Principles of EU Law’ (2010) 47(6) *Common Market Law Review* 1629–69.

<sup>17</sup> J Horder, ‘Bureaucratic “Criminal” Law: Too Much of a Bad Thing?’, *LSE Law, Society and Economy Working Papers* 1/2014.

<sup>18</sup> See, for instance, M Kaiafa-Gbandis, ‘The Importance of Core Principles of Substantive Criminal Law for a European Criminal Policy Respecting Fundamental Rights and the Rule of Law’ (2011) 1(1) *European Criminal Law Review* 6, 28.

<sup>19</sup> ‘The Manifesto on European Criminal Policy in 2011’ (2011) 1 *European Criminal Law Review* 86–103.



principle of subsidiarity. As has been rightly noted,<sup>20</sup> the *Manifesto* contains some principles which are not all criminal law-specific. In particular, subsidiarity and coherence are defined as ‘meta-principles’ and are distinguished from ‘well-established and fundamental principles of criminal law’ (such as *ultima ratio* and legitimate interest or legality and guilt), although even here doubts are raised about their validity as guiding principles for national and European criminal law and their respect in practice.<sup>21</sup> Very general principles, not necessarily context-specific, such as subsidiarity, coherence and proportionality might be preferable to no principles at all. But that would still leave unanswered the question of the specificity of criminal law and the need for specific principles capable of limiting its expansion.

Transparency, together with other governance or administrative law principles such as accountability and participation, figures predominantly in many policy *and* academic writings on global justice. The authors behind the 2005 Global Administrative Law Project, for instance, propose it as a key procedural principle, while in 2001 Brants et al insisted on governance principles such as transparency, accountability and participation as starting points for domestic criminal law reform. Given that the main focus of this volume is the concept of transparency, it is to these principles that I now turn.

#### IV. TRANSPARENCY, ACCOUNTABILITY AND PARTICIPATION IN CRIMINAL LAW (BRANTS ET AL)

Around the turn of the century, there were intensive discussions in the Netherlands about a possible reform of the Dutch *Code of Criminal Procedure*.<sup>22</sup> A research group ‘Strafvordering 2001’ was asked to examine how a new code should look, given contemporary needs and standards. Critics of its proposals included Brants, Mevis and Prakken, who saw a legitimate criminal law system as anchored in three key notions: transparency, accountability and participation;<sup>23</sup> not principles but *central starting points, requirements, key notions and central notions*.<sup>24</sup> These are said to

<sup>20</sup> L Foffani, ‘Il Manifesto sulla Politica Criminale Europea’ (2010) *Criminalia* 657, 665.

<sup>21</sup> M Massé, JP Jean and A Giudicielli (eds), *Un droit pénal postmoderne ? Mise en perspective des évolutions et ruptures contemporaines* (Paris, PUF, 2009). On the specific point of the crisis of *ultima ratio* as a criminal law principle, see M van de Kerchove, ‘Le principe de subsidiarité’ in A Giudicielli-Delage and C Lazerges (eds), *Le Droit Pénal de l’Union Européenne au Lendemain du Traité de Lisbonne* (Paris, Société de Législation Comparée, 2012).

<sup>22</sup> See the retrospective analysis of these discussions in M Groenhuijsen and T Kooijmans (eds), *The Reform of the Dutch Code of Criminal Procedure in Comparative Perspective* (Leiden, Brill, 2012).

<sup>23</sup> CH Brants, PAM Mevis and E Prakken (eds), *Legitieme strafvordering. Rechten van de mens als inspiratie in de 21ste eeuw* (Antwerp, Intersentia, 2001) 1–21.

<sup>24</sup> *ibid* 2, 7 and 19.

derive from constitutionalism and the case law of the European Court on Human Rights, though elsewhere the authors attribute them to the legacy of the Enlightenment and consider them interwoven with the principles of the rule of law and democracy—touchstones which all criminal proceedings of a democratic state should meet.

*Participation* refers to participation of the accused and the public, but also of the victim and other private persons (eg, investigators, consultants and experts) in criminal proceedings.<sup>25</sup> *Transparency* refers to publicity of court procedures, both external and internal, and is a key notion in determining the role of the media in the criminal justice system.<sup>26</sup> *Accountability* is the standard for assessing the respective responsibilities and duties of the actors involved in the criminal justice system to account for themselves: what accountability structures are there? What kinds of accounts need to be provided? Who can set existing control and accountability mechanisms in motion? Accountability refers to the duty to justify oneself and to develop practices to do so, but also to the duty to set up structures that allow this account-giving in front of someone.<sup>27</sup>

#### V. TRANSPARENCY, ACCOUNTABILITY AND TRANSPARENCY IN GLOBAL LAW (THE GLOBAL ADMINISTRATIVE LAW PROJECT)

Brants, Mevis and Prakken specifically aimed at influencing Dutch law reform, but the standards they identify are presented as general reference points for all criminal states that are respectful of the rule of law, democracy and human rights. In the literature on globalisation and global law, the same standards are also central in the Global Administrative Law project proposed by Kingsbury, Krisch and Stewart in 2005.<sup>28</sup> The Global Administrative Law project should be understood in the context of the debate between global constitutionalism and global pluralism.<sup>29</sup> Both schools look at global developments, the growing interconnectedness of actors, the changing role

<sup>25</sup> *ibid* 7–8.

<sup>26</sup> *ibid* 10–11.

<sup>27</sup> *ibid* 8–10.

<sup>28</sup> B Kingsbury, N Krisch and RB Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15. See also N Krisch, 'Global Administrative Law and the Constitutional Ambition' in P Dobner and M Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford, Oxford University Press, 2010). For critical assessments, see DH Rached, 'Doomed Aspiration of Pure Instrumentality: Global Administrative Law and Accountability' (2014) 3 *Global Constitutionalism* 338; A Somek, 'The Concept of "Law" in Global Administrative Law: A Reply to Benedict Kingsbury' (2009) 20(4) *European Journal of International Law* 985.

<sup>29</sup> A Peters, 'The Constitutionalisation of International Organisations' in N Walker, J Shaw and S Tierney (eds), *Europe's Constitutional Mosaic* (Oxford, Hart Publishing, 2011) 253.



of the state and the growing impact of international and national non-state actors, and both detect many accountability problems, but the solutions they offer differ.

Constitutionalism is of course familiar to us all, since it is a way of organising states. It is about the rule of law, checks and balances, human rights protection and also to a somewhat lesser degree democracy. Global constitutionalists 'see' and 'defend' constitutionalisation *beyond* the state. The growing body of international human rights law, the success of the International Criminal Court (ICC) and the success of the transformation of the European Community into a more constitutionalist *EU* fuel this movement and encourage it to continue. The analogy with the 'counterreformation' in criminal law scholarship is not hard to see. Otfried Höffe, for example, assumes that everything is already in place for an overarching system of criminal law, based on a division of work between an international court and domestic systems. This optimistic perspective allows Höffe to set out a full programme for global criminal law that assumes common principles and minima, and the creation of a global world court that would not only judge core crimes, but would also serve as an appeal court.<sup>30</sup>

Global pluralists like Krisch and Bernman underline the attractiveness of the constitutionalist endeavour, but see many objections, ranging from the practical ('it will never be realized') to the normative ('diversity is good', 'we should respect political choices made by other states'). The Global Administrative Law project presents itself as a spin-off from global pluralism and as an alternative whose methodology and understanding of current globalisation developments differs from constitutionalism. It is driven by the perception that the evolution of global law mostly engages issues of administrative rather than constitutional law or, alternatively, can be better understood from a more administrative than ambitious, constitutional, principles-based perspective. The authors behind the Global Administrative Law project are concerned about the *de facto* independence and discretion of transnational actors with some sort of decision-making power.<sup>31</sup> But rather than incorporating strong constitutional machinery, they propose the organisation of good governance through guarantees, mechanisms and values such as transparency and participation. These are mainly process-related (as opposed to substantive) values that suggest only modest interventions; institutional reform 'writ small', one step at a time with prudent attention to non-ideal factual contexts, and aimed at legitimising accountability arrangements of institutions beyond the state.

In their 2005 book, Kingsbury, Krisch and Stewart hardly touch upon criminal law issues. Yet, there are also non-judicial actors on the global

<sup>30</sup> Höffe, *Democracy* (2007) 262–68.

<sup>31</sup> Kingsbury, Krisch and Stewart, 'The Emergence' (2005) 26.

criminal law scene. Even the traditional judicial actors (courts, judges and prosecutors) should be seen as holding decision-making powers and governance responsibilities.<sup>32</sup> All through the ICC *Lubanga* trial, judges and prosecutor were at odds regarding the selection of crimes to be tried and victims to be heard at trial.<sup>33</sup> Moreover, increasingly courts and prosecutors at all levels will be confronted with the need to foster a global administration of criminal justice ('do we prosecute or will others?'),<sup>34</sup> a task requiring an understanding of good governance and notions such as transparency, accountability and participation. A fine example of this development is the ICC Prosecutor's strategic policy plan and the willingness of the current ICC Prosecutor to seek acceptance for her policy options.<sup>35</sup> Governance requirements that Kingsbury, Krisch and Stewart would impose on administrations must also be met when courts and prosecutors go beyond mere adjudication.<sup>36</sup>

## VI. TRANSPARENCY, ACCOUNTABILITY AND TRANSPARENCY IN GLOBAL CRIMINAL LAW

What Brants, Mevis and Prakken and the Global Administrative Law authors propose is not easy. Western legal education has been thoroughly moulded by constitutionalism and the belief that principles exist with regard to the general organisation of both the state and the criminal system. Criminal law and procedure have been theorised and regulated since the Enlightenment by a model based on principles such as legality, specific benchmarks for guilt

<sup>32</sup> *ibid* 26.

<sup>33</sup> See L Moffett, 'Meaningful and Effective? Considering Victims' Interests through Participation at the International Criminal Court' (2015) 26(2) *Criminal Law Forum* 255–89, in particular 275, discussing the Trial Chamber I's decision to hear victims about crimes not selected for trial by the Prosecutor.

<sup>34</sup> Höffe (n 14) 264. On the complementarity mechanism in the ICC statute as a forum for managerial interaction between the ICC and states, see C Stahn, 'Complementarity: A Tale of Two Notions' (2008) 19 *Criminal Law Forum* 87.

<sup>35</sup> Expert Seminar: 'The Role of the Prosecutor in the Emerging Practice of the International Criminal Court', 24 October 2013, [www.humanrightsdoctorate.blogspot.be/2013/10/new-approach-to-investigations-at.html](http://www.humanrightsdoctorate.blogspot.be/2013/10/new-approach-to-investigations-at.html). At this 2013 expert seminar in Brussels, ICC Prosecutor Fatou Bensouda presented her first strategic policy plan in front of an academic and NGO community.

<sup>36</sup> Which they must, given that many international criminal courts also have a general preventive role, which they fulfil by combining judicial proceedings with external relations, outreach and public information activities. On the ICC, see M Holvoet and M Mema, 'The International Criminal Court and the Responsibility to Protect' in D Fiott and J Koops (eds), *The Responsibility to Protect and the Third Pillar: Legitimacy and Operationalization* (Basingstoke, Palgrave Macmillan, 2014) 23, with reference to R Cryer, H Friman, D Robinson and E Wilmschurst, *An Introduction to International Criminal Law and Procedure* (Cambridge, Cambridge University Press, 2007) 22–39; H Olasolo, 'The ICC's Timely Intervention as a Result of Threats of Future Atrocity Crimes' in H Olasolo (ed), *Essays on International Criminal Justice* (Oxford, Hart Publishing, 2012) 1–19.

and conviction assessments (such as beyond reasonable doubt), which are somehow similarly grounded in the concept of the rule of law, and human rights principles and considerations. Brants et al, while not denying this, shift the perspective to the procedural. Both the Global Administrative Law project and Brants et al's proposal take stock of the failures of traditional global constitutionalism and traditional principled approaches to criminal law, and rely on concepts such as transparency, accountability and participation as a viable solution.

I advocate using Brants et al's model at the global level and expanding the Global Administrative Law analysis to include global criminal law players, and to judge and ground their roles and behaviour against and in participation, transparency and accountability. In the realm of global criminal law, both global constitutionalism and substantive principles of criminal justice would probably fail to ensure the accountability of the relevant actors.<sup>37</sup> Indeed, in a global criminal justice context with its variety of actors and norms, and time and place as differentiating factors, one cannot but be attracted by the pluralist pragmatic step-by-step solutions of the proposal of Brants et al and the Global Administrative Law project. These contextual elements explain why the one-size-fits-all programme of accountability enhancement of the global constitutionalist model, or the mere application of general criminal law principles rooted in national constitutional values, is less appropriate. The global criminal justice context demands more flexible, process-oriented principles.

Let us recall the diversity of the hybrid courts. There is no 'model' as such and each has been established in a variety of situations and has different features depending on the political context: legal basis, structure, applicable law and composition.<sup>38</sup> These hybrid courts will not disappear; on the contrary, there are proposals to create many more. Their political dimension, including the role of the governments that host them, will remain very visible. Pushing an ideal constitutionalist design for hybrid courts or abandoning them by transferring to the ICC will not (always) be successful, but insisting on accountability and transparency could allow us to accept

<sup>37</sup> See M Reglitz, 'Political Legitimacy without a (Claim-)Right to Rule' (2015) 21 *Res Publica* 291. Since it is doubtful that we can establish global institutions that are democratically authorised anytime soon, we have to make sense of existing non-state players, which is precisely the object of Reglitz's analysis. Note that he does not seem to differentiate between judicial global actors and others entrusted 'with relatively uncontroversial general duties such as the persecution of war criminals and bans on aggressive wars, illegal weapons trading, unfair terms and conditions of trade, and the exclusion of people from making use of a fair share of the world's resources etc.' (at 306).

<sup>38</sup> S Williams, 'Review of John D. Ciorciari and Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia* (Michigan University Press, 2014)' (2015) 13 *Journal of International Criminal Justice* 660, 661.

that imperfect justice might be better than no justice.<sup>39</sup> The challenge is to develop the meaning of transparency, participation and accountability, drawing from both theoretical frameworks sketched above, to make them operational in the context of transitional and international justice.

## VII. TRANSPARENCY AND OPENNESS (THE FIRST GOVERNANCE PRINCIPLE)

Transparency has not been uncontested in the history of global governance. In some ways it has been a flagship of neoliberalism. Looking back at the past 30 years of economic globalisation, Recalde notes an acute process of deregulation or dismantling of regulatory mechanisms, fuelled by market scepticism towards the role of regulatory bodies, and a preference for self-regulation. In an area freed from supervision and control, transparency was advanced as the only indispensable requirement and precondition for rational and efficient decision-making.<sup>40</sup> Yet, last decade's financial crisis has shown that transparency did not fulfil its promise.<sup>41</sup> Its close links to deregulation suggests that transparency-based policies have led to less regulation *and* participation. Aware of Recalde's critical observations, Barnes defends transparency as one of the most basic of principles, a prior condition for the existence of many others. Adding, however, that sometimes more than transparency may be needed, such as the requirement to state the reasoning behind decisions, the need for control and accountability of different bodies and fair representation in membership, and requirements of impartiality and independence.<sup>42</sup>

In his study on *transparency* and *openness* (limited to EU law), Alberto Alemanno highlights their connection but also what sets them apart.<sup>43</sup> Both notions convey a common idea: the 'opposite of opaqueness, complexity or

<sup>39</sup> See the insistence on the role of the UN and key state actors to create accountability and transparency mechanisms to make hybrid courts live up to international standards, in JD Ciorciari and A Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia* (Ann Arbor, Michigan University Press, 2014) 261–78. See also Williams, 'Review' (2014) 662.

<sup>40</sup> On transparency in contemporary theories of economics and management studies, see T Erkkilä, *Government Transparency. Impacts and Unintended Consequences* (Basingstoke, Palgrave Macmillan, 2012) 13–15.

<sup>41</sup> A Recalde, 'Transparencia y autonomía del mercado: principios inspiradores de la regulación financiera antes de la crisis' in RG Macho (ed), *Ordenación y transparencia económica en el derecho público y privado* (Madrid, Marcial Pons, 2014).

<sup>42</sup> JB Vázquez, 'La transparencia: cuando los sujetos privados desarrollan actividades regulatorias' in RG Macho (ed), *Ordenación y transparencia económica en el derecho público y privado* (Madrid, Marcial Pons, 2014).

<sup>43</sup> A Alemanno, 'Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy' (2014) 39(1) *European Law Review* 72. On the related notion of publicity, see Erkkilä, *Government Transparency* (2012) 3–6.

even secretiveness'. Alemanno sees openness as the greater good: transparency is merely the most developed legal dimension of openness, recognised in primary law and developed in EU secondary law and case law.<sup>44</sup> The best-known application of this legal transparency is the provision of information and, correspondingly, the right to access documents, conceived in a passive mode and requiring no more than providing individuals with information when they specifically ask for it.<sup>45</sup>

A broader, holistic perspective assumes that the duty of transparency extends to additional, more active obligations such as using clear language, consistently interpreting and applying the law, and supporting action with reasons, facilitating both accountability and participation.<sup>46</sup> These additional duties (seven in total)<sup>47</sup> focus on how information is communicated and turn *transparency* into *openness*.<sup>48</sup> Thus, openness is more than transparency and is itself instrumental to the enjoyment of a right to participate in the democratic life of an institution or polity.

Kingsbury, Krisch and Stewart place considerable weight on transparency and its possible application to international actors. How much transparency is needed in each case and for every actor depends on several factors (the way in which information is communicated, the effectiveness, the usefulness for the democratic life of an institution or polity). Transparency is open and sensitive to political environments that are poorly regulated by law. Rached points to the modular and sector-sensitive nature of principles like transparency, as understood by the Global Administrative Law project. One needs to verify 'how, in each and every global body, those general principles of administrative law are and should be put into effect. The exact mix and form, or the particular version of due process that is required in a given sector, "remains very much up for grabs"'.<sup>49</sup> Insisting on transparency neither implies universal homogeneity in terms of procedural solutions nor resembles an arbitrary adhocism.<sup>50</sup>

<sup>44</sup> Alemanno, 'Unpacking the Principle' (2014) 73. See *in extenso* on this right I Spahiu, 'Courts: An Effective Venue to Promote Government Transparency? The Case of the Court of Justice of the European Union' (2015) 80 *Utrecht Journal of International and European Law* 5.

<sup>45</sup> Alemanno (n 43) 75.

<sup>46</sup> *ibid.*

<sup>47</sup> Specifically: (1) clarity; (2) understandability and knowledge of decisional processes; (3) freedom of information; (4) access to open proceedings; (5) the duty to inform who may be seeking to influence decision-making; (6) the duty to publish all legislative outputs; and (7) the giving of reasons (*ibid.* 82).

<sup>48</sup> This is also the understanding of the European Commission in its White Paper on governance. See Communication from the Commission of 25 July 2001 'European Governance—A White Paper', COM(2001) 428 final, OJ C 287 of 12 October 2001.

<sup>49</sup> Rached, 'Doomed Aspiration' (2014) 361–62, with reference to E MacDonald and E Shamir-Borer, 'Meeting the Challenges of Global Governance: Administrative and Constitutional Approaches', 2008, NYU Hauser Globalization Colloquium, 3, available at <http://iilj.org/courses/documents/MacDonald.Shamir-Borer.92508.pdf>.

<sup>50</sup> Rached (n 28) 361–62.



## VIII. TRANSPARENCY IN GLOBAL CRIMINAL LAW

In the criminal justice context, many questions arise: is there a legal basis to require transparency, intended as openness, from global criminal law (policy) actors? And is it enforceable in court? Does openness require full transparency, even at the cost of privacy and other rights of persons concerned? And, lastly, are there legal or non-legal means other than court procedures to promote or enforce it? These questions will not guarantee uniform answers, but nor do they need to.<sup>51</sup>

Transparency in classic criminal law gives the defendant a legal right to access many types of evidence before trial in order to make informed decisions and to minimise surprise at trial. Transparency by judges about their work contributes to the idea of procedural justice.<sup>52</sup> Indeed, criminal trials in general, international criminal trials and transitional justice methods such as truth commissions *are* about transparency, in the sense that they provide clarity regarding criminal facts affecting individuals and entire populations. They are truth-finding mechanisms that Miguel de Serpa Soares, a high-ranking UN official, sees as instrumental to realising a right to know (about heinous crimes and the circumstances of their commission) and the right to justice (to see perpetrators brought to justice).<sup>53</sup> For De Serpa Soares, in the context of the commission of international crimes, both rights are fundamental and have an individual *and* collective dimension.<sup>54</sup>

This collective right to the truth has altered the traditional prerogative of states to investigate criminal activity, a role now increasingly supplemented by that assumed by the international community to investigate, record and make known facts about crimes in certain countries that destabilise the whole international community. This explains why the UN has created numerous different commissions of inquiry, *all*, if we believe de Serpa Soares, made possible by the broad mandate of the UN to maintain international peace and security (Article 1 UN Charter).<sup>55</sup>

<sup>51</sup> The study by Antonios Tzanakopoulos offers an adequate starting point here. Tzanakopoulos shows that transparency has insufficient status as principle of international or customary law: A Tzanakopoulos, 'Strengthening Security Council Accountability for Sanctions: The Role of International Responsibility' (2014) *Journal of Conflict & Security Law* 1, 16. He also observes that transparency lacks independent normative charge and that the degree of transparency obtained in a given situation partly depends on the outcome of political power pressure: if there is no legal basis, that is all it comes to. However, no transparency does not mean that no accountability is possible. UN Member States have successfully pressured and threatened the UN Security Council with disobedience in situations where not enough openness was given, and subsequently obtained more openness (Tzanakopoulos, 'Strengthening Security' (2014) 16).

<sup>52</sup> See TR Tyler, 'Procedural Justice and the Courts' (2007–08) 44 *Court Review* 26, 29; E Brems and L Lavrysen, 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights' (2013) 35 *Human Rights Quarterly* 176.

<sup>53</sup> M de Serpa Soares, 'An Age of Accountability' (2015) 13(4) *Journal of International Criminal Justice* 669, 670.

<sup>54</sup> *ibid* 670.

<sup>55</sup> *ibid* 670, 673.



The coexistence of a plurality of truth-finding mechanisms can be a challenge, in particular when considering both trials and truth commissions. For Bisset, trials have a retributive focus on individual cases, while truth commissions have an investigatory focus on documenting the past and establishing truth.<sup>56</sup> Both have strengths and weaknesses with regard to truth-finding and both should be applied when appropriate. The impact of the ICC and the complementarity principle on the coexistence of trials and other truth-finding methods is still unclear, but a broad discretion to replace trials with truth commissions or amnesties certainly no longer exists. One possible option remains to install truth commissions as complementary to or as a forerunner of trials.<sup>57</sup> This, however, raises important questions about obligations to cooperate and provide assistance to courts and the further use of confidential information and self-incriminating evidence. In this connection, Bisset suggests that the ICC should create a transparent policy regarding the multi-layeredness of transitional justice in order to help clarify respective roles and guarantee overall fairness—for instance, by consulting a truth commission to avoid disputes and showing self-restraint by accessing confidential information only as an exception rather than the norm.<sup>58</sup>

The rule that trials are unfair if the defendant is denied access to many types of evidence was confirmed at the global level by the ICC, which ordered Lubanga's release on 2 July 2008 on the grounds that a fair trial was impossible given that the Prosecutor had obtained evidence on the condition of confidentiality and was not willing to share it. The trial continued only when the Prosecutor agreed to make all confidential information available.<sup>59</sup> One author spoke about 'behind-the-scenes decision making that brought the exculpatory evidence to light and allowed the stay of proceedings to be lifted on 18 November 2008'.<sup>60</sup> The Rome Treaty does mention the prosecution's right to obtain confidential evidence (Article 54(3)(e)) and its responsibility to disclose potentially exculpatory evidence (Article 67(2)), but commentators find the guidance insufficient and foresee more questions about the degree to which transparency should be guaranteed.<sup>61</sup>

<sup>56</sup> A Bisset, *Truth Commissions and Criminal Courts* (Cambridge, Cambridge University Press, 2014) 42–45. For a criticism of Bisset's working distinction, see Kotecha, 'Book Review' (2014) 412.

<sup>57</sup> *ibid* 69.

<sup>58</sup> *ibid* 137 and 191.

<sup>59</sup> International Criminal Court, 'Stay of Proceedings in the Lubanga Case is Lifted—Trial Provisionally Scheduled for 26 January 2009', 18 November 2008, <http://reliefweb.int/report/democratic-republic-congo/dr-congo-stay-proceedings-lubanga-case-lifted-trial-provisionally>. See A Whiting, 'Lead Evidence and Discovery before the International Criminal Court: The Lubanga Case' (2009) 14 *UCLA Journal of International Law and Foreign Affairs* 207.

<sup>60</sup> R Katzman, 'The Non-disclosure of Confidential Exculpatory Evidence and the Lubanga Proceedings: How the ICC Defense System Affects the Accused's Right to a Fair Trial' (2009) 8 *Northwestern Journal of International Human Rights* 77, 78.

<sup>61</sup> Whiting, 'Lead Evidence' (2009) 207.

Of the non-judicial actors, the first that comes to mind is the UN Security Council with its enormous powers under the UN Charter and, in particular, its sanctioning powers under Article 41 affecting many aspects of global criminal law.<sup>62</sup> Tzanakopoulos has nicely identified the low level of engagement of the general public with the Security Council's actions, its particularly secretive mode of operation—the result of inappropriate organisational rules—and the effective pressure by Member States and regional courts to create more openness about the terrorist sanctions system and to accept quasi-external oversight of listing and delisting procedures.<sup>63</sup> A constitutionalist would rewrite the UN Charter to make its transparency provisions more explicit; meanwhile, this is a small step forwards.

What about transparency requirements imposed on private actors? Again, the answer needs to be modular and sector-sensitive, with broad exceptions for the media and minimally a deontological duty for transnational corporations to report on their own behaviour and interactions with governments.<sup>64</sup> Very low transparency can be required from WikiLeaks and other similar initiatives that give whistleblowers a voice by publishing censored or otherwise restricted official materials involving war, spying and corruption, and are very vulnerable.<sup>65</sup> The Snowden revelations make clear the types of transparency concepts used in discussions about surveillance and governmental powers. Very prevalent amongst secret services and law enforcement officials is the idea of *radical transparency*, opening up both public processes and private lives of citizens for inspection: *nothing to hide, nothing to fear*.<sup>66</sup> This contrasts with the traditional *liberal transparency* concept focused on the public inspection of state power, rejecting any tendency towards the 'uncheckability' of power and granting control and privacy to law-abiding citizens. One criterion by which to judge the amount of transparency will be the actual power of the actor and risks of abuses. This rule of thumb explains why more transparency can be required from certain corporations, but not from all. For journalists and whistleblowers, the (civil liberties) stakes are higher. Here there is simply no rule of thumb, although careful ethical consideration can help create some sort of framework.<sup>67</sup>

<sup>62</sup> For an overview of the Security Council's sanctioning powers, see Tzanakopoulos (n 51) 6–7.

<sup>63</sup> *ibid* 17.

<sup>64</sup> P De Hert and D Kloza, 'Corporate Transparency is Crucial, But it Must Also Become Far More Meaningful', *The Privacy Surgeon*, 2014, <http://www.privacysurgeon.org/blog/incision/corporate-transparency-is-crucial-but-it-must-also-become-far-more-meaningful>.

<sup>65</sup> P De Hert and D Kloza, 'WikiLeaks, Privacy, Territoriality and Pluralism. What Does Matter and What Does Not?', 6 January 2011, [www.vub.ac.be/LSTS/pub/Dehert/Dehert\\_361.pdf](http://www.vub.ac.be/LSTS/pub/Dehert/Dehert_361.pdf). On the infiltration of OpenLeaks by German government officials, see <http://it.slashdot.org/story/12/09/14/1322238/why-wikileaks-spinoff-openleaks-failed>.

<sup>66</sup> V Bakir and A McStay, 'Assessing Interdisciplinary Academic and Multi-stakeholder Positions on Transparency in the Post-Snowden Leak Era' (2015) 12(3–4) *Ethical Space: The International Journal of Communication Ethics* 25, 27.

<sup>67</sup> P Lashmar, 'Spies and Journalists: Towards an Ethical Framework?' (2015) 12(3–4) *Ethical Space. The International Journal of Communication Ethics* 4. See also T Crook, 'Useful

## IX. ACCOUNTABILITY (THE SECOND GOVERNANCE PRINCIPLE)

Like transparency, accountability has become a global concept of responsible government and governance. The idea that power must be held to account is a general principle, not necessarily legal in nature but triggered by a ‘gut feeling’: entities should not exercise power without having to somehow account for it.<sup>68</sup> This status as a *gut-felt necessity* explains why accountability is not only promoted as a standard by global pluralists, but also forms part of the global constitutionalist programme for reform beyond the state.<sup>69</sup>

Accountability can be considered the alter ego of transparency<sup>70</sup> and at the same time also a final good to which transparency is instrumental.<sup>71</sup> Accountability is equally modular. There is no universally accepted definition of what accountability is and there is no unique answer to, or form or outcome of, accountability problems. The form can be legal, but also political, economic, financial, market-based, administrative, hierarchical and reputational (and this with many sub-divisions).<sup>72</sup> Like transparency, there is no intrinsic link with law. Accountability can exist even when the law is silent and there are no independent and impartial third parties to decide matters with binding force.<sup>73</sup> Other actors can play a role in enforcing accountability, public opinion being only one of them. Again, contextual solutions, taking into account power configurations and what is there already, will define responses to ‘the who, what, and how’ question.

The foregoing explains why I avoid the traditional presentation of accountability as a combination of the (internal) duty to justify oneself and to develop practices to do so on the one hand, and, on the other hand, the (external) duty to set up structures that allow for accountability and increase accountability, control and sanctioning.<sup>74</sup> Some authors refuse

Idiots or Big Brother’s Antidote? Analysing the Ethical Role of the State, *Guardian* and Edward Snowden in the Controversy over Surveillance and Whistle-Blowing’ (2015) 12(3–4) *Ethical Space. The International Journal of Communication Ethics* 14.

<sup>68</sup> Tzanakopoulos (n 51) 1.

<sup>69</sup> See Peters, ‘The Constitutionalisation’ (2011) 264–66.

<sup>70</sup> Tzanakopoulos (n 51) 15, with reference to C Harlow, *Accountability in the European Union* (Oxford, Oxford University Press, 2002) 7.

<sup>71</sup> Moreover, through the analysis of the concept of accountability, one can especially appreciate the tension with others such as democratic participation. Given the interconnection with transparency, this analysis of the implication for other values also applies to transparency itself.

<sup>72</sup> Tzanakopoulos (n 51) 4; M Bovens, ‘Analysing and Assessing Accountability: A Conceptual Framework’ (2007) 13(4) *European Law Journal* 447, 460–61.

<sup>73</sup> Tzanakopoulos (n 51) 10.

<sup>74</sup> Brants, Mevis and Prakken (n 23) 8–10. This view on accountability and its two duties can be traced back to the definition of Richard Mulgan in his seminal article on accountability: R Mulgan, ‘Accountability: An Ever-Expanding Concept?’ (2000) 78 *Public Administration* 555, 555, which was written to defend a restrictive view on the definition of accountability (at 571). Mulgan rejects broader uses of the term in literature that create ‘confusion’ and imply a ‘questionable shift of focus away from the central importance of external scrutiny’ (at 557).

to use the term ‘accountability’ for mechanisms based solely on the first (internal-oriented) duty, but not on the (external) second. So, ‘accountability’ would not cover arrangements that lack a sanctioning system. I prefer a more pragmatic understanding of accountability that includes all kinds of accountability arrangements, including the self-imposed.<sup>75</sup> It runs against the practical wisdom of the Global Administrative Law project to disregard the latter; more logical is to refer to thin or imperfect accountability.<sup>76</sup> Such a notion also helps underline the existence of many variations in accountability schemes and, within each variation, the many rules and procedures that can produce effective or less effective accountability.<sup>77</sup>

Bovens sees a threefold rationale (democratic, constitutional and learning) for public accountability (the object of his analysis) with two additional indirect rationales (legitimacy and catharsis). Public accountability serves the democratic perspective, helping citizens to hold responsible those in public office. Accountability arrangements prevent the development of concentrations of power, and they enhance the learning capacity and effectiveness of public administration. Behind these three perspectives lurks a far greater, more abstract concern with legitimacy: processes of accountability provide opportunities to explain and justify intentions, and to obtain feedback from other actors, enhancing acceptance and confidence.<sup>78</sup> The other indirect rationale that Bovens identifies is closely linked to the legitimacy concern and deals with *catharsis*:

In the incidental case of tragedies, fiascos and failures, processes of public account giving may also have an important ritual, purifying function—they can help to provide public *catharsis*. Public account giving can help to bring a tragic period to an end because it can offer a platform for the victims to voice their grievances, and for the real or reputed perpetrators to account for themselves and to justify or excuse their conduct. This can be an important secondary effect of parliamentary inquiries, official investigations or public hearings in cases of natural disasters, plane crashes or railroad accidents. The South African ‘truth commissions’, and various war crime tribunals, starting with the Tokyo and Nuremberg trials, the Eichmann trial, up to the Yugoslav tribunal are at least partly meant to fulfil

<sup>75</sup> For a critique of Mulgan, see Erkkilä (n 40) 10, with reference to M Dubnick, ‘Accountability and Ethics: Reconsidering the Relationships’ (2003) 6(3) *International Journal of Organization Theory and Behavior* 405.

<sup>76</sup> cf Bovens, ‘Analysing and Assessing Accountability’ (2007) 449–54, which distinguishes between broad and narrow accountability. Concurring with Mulgan (see n 74), Bovens insists on a narrow or strict interpretation of accountability, with the possibility of sanctions or consequences of a constitutive element (at 451). My problem with this narrow and strict approach is that informal arrangements then become problematic.

<sup>77</sup> See the definition of accountability, focusing only on the first duty, given by the International Law Association, *Final Conference Report: Accountability of International Organizations* (International Law Association, 2004): ‘the duty to account for the exercise of power’. See equally these sources for a listing of principles that can make accountability more effective.

<sup>78</sup> Bovens (n 72) 464.

this function. Public processes of calling to account create the opportunity for penitence, reparation and forgiveness, and can thus provide social or political closure.<sup>79</sup>

Bovens observes that neither legitimacy nor catharsis can be easily evaluated, since they concern meta-effects, which explains why he narrows down his analysis to three principal direct reasons for accountability: democratic control, constitutional or countervailing powers, and learning.<sup>80</sup> Each of these perspectives yields a separate theoretical perspective on the rationale behind accountability and a separate perspective for the assessment of accountability relations.<sup>81</sup> Moreover, they sometimes point in different directions; accountability arrangements can score well from one perspective, but not from others.<sup>82</sup> This explains the importance of the 'why-question' regarding accountability: *why is accountability important and what is the purpose of the various different forms of accountability?*<sup>83</sup>

#### X. ACCOUNTABILITY IN GLOBAL CRIMINAL LAW: PERFECT AND IMPERFECT ARRANGEMENTS

Accountability is a difficult concept for lawyers. Usually they avoid talking about it, but when they do, they see nothing else in law. A fine example is Rebecca Brown's 1998 article on 'Accountability, Liberty, and the Constitution'. By looking at constitutionalism from the viewpoint of accountability rather than democracy, the author comes to a 'different model of constitutionalism' and a different understanding of American constitutionalism, one that depicts accountability as a structural feature of the Constitution, similar to separation of powers, checks and balances, or federalism, the purpose of which is to protect liberty.<sup>84</sup>

Similarly, accountability is probably intrinsic to classic criminal law: following up on criminal facts with a court procedure *is* (bringing) accountability. Courts in states with international human rights monitoring are used to having their performance judged against certain standards. These accountability requirements have been spelled out by supervisory bodies such as the Inter-American Court and Commission on Human Rights and the UN Human Rights Committee, and most clearly in the jurisprudence of the European Court of Human Rights (ECtHR):<sup>85</sup> violations of human

<sup>79</sup> *ibid.*

<sup>80</sup> *ibid* 465.

<sup>81</sup> *ibid* 462.

<sup>82</sup> See *ibid* 466.

<sup>83</sup> *ibid* 462–67.

<sup>84</sup> RL Brown, 'Accountability, Liberty, and the Constitution' (1998) 98 *Columbia Law Review* 531.

<sup>85</sup> Kessler and Werner, 'Extrajudicial Killing' (2008) 297.



rights such as the right to life need to be followed by an independent and effective investigation capable of identifying those responsible and determining whether the force used was justified. The investigation must also be prompt and expeditious, and ‘there must be a sufficient element of public scrutiny of the investigation or of its results to secure accountability in practice as well as in theory’.<sup>86</sup>

In global criminal law, the accountability standard is directed towards all actors involved. Coming back to the *gut-felt necessity* to have accountability everywhere in some way or another, de Serpa Soares subtly observes that we have only recently entered *An Age of Accountability*.<sup>87</sup> The *guts* now feel different to some time ago. Only now is the time right for recognising an individual and collective right to justice (to see perpetrators brought to justice) next to the connected right to know about injustices.<sup>88</sup> De Serpa Soares sees enforcing both rights at the international level, when states are unwilling to act, as falling within the broad mandate of the UN to maintain international peace and security spelled out in the UN Charter,<sup>89</sup> and as a response to contemporary demands by the international community.

Accountability, too, is also modular, as is well known to professionals of transnational justice with its arsenal of accountability mechanisms. Existing options range from commissions of inquiry (‘truth commissions’), prosecutions and lustration to compensation for victims.<sup>90</sup> The trial of Charles Taylor by the Special Court for Sierra Leone ran in conjunction with truth commissions and localised accountability processes in both Liberia and Sierra Leone.<sup>91</sup> In Kenya, constitutional reforms were introduced at the same time as a truth commission, a judicial vetting board and the prosecution of senior officials before the ICC.<sup>92</sup> In the context of transparency,

<sup>86</sup> ECtHR, *McKerr v UK*, Judgment of 4 May 2001, paras 110–15. See Kessler and Werner (n 11) 297, also referring to *Kelly and Others v UK*, 4 May 2001; *Shanaghan v UK*, 4 May 2001.

<sup>87</sup> De Serpa Soares (n 53) 673.

<sup>88</sup> *ibid* 672.

<sup>89</sup> *ibid* 673.

<sup>90</sup> A historical discussion and secondary literature on accountability is reprinted in N Kritz (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Washington DC, United States Institute of Peace Press, 1995) 3 vols. See also the review and discussion of this book by SR Ratner, ‘Judging the Past: State Practice and the Law of Accountability’ (1998) 9 *European Journal of International Law* 412. Volume 2 of Neil Kritz’s *Transitional Justice* shows that states use a variety of accountability options, sometimes consecutively, often of a non-prosecutorial nature.

<sup>91</sup> T Kelsall, *Culture under Cross-examination: International Justice and the Special Court for Sierra Leone* (Cambridge, Cambridge University Press, 2009); M Schotsmans, ‘Blow Your Mind and Cool Your Heart: Can Traditional Based Justice Fill the Transitional Justice Gap in Sierra Leone?’ in N Palmer, P Clark and D Granville (eds), *Critical Perspectives in Transitional Justice* (Brussels, Intersentia, 2011).

<sup>92</sup> G Lynch, ‘Truth Commissions as a Tool of Transitional Justice: Lessons from Kenya’ in A Robertson and R Jones-Parry (eds), *Commonwealth Governance Handbook 2012–2013* (Cambridge, Nexus/Commonwealth Secretariat, 2012); JD Barkan and M Mutua, ‘Turning the Corner in Kenya: A New Constitution in Nairobi’, *Foreign Affairs* (10 August 2010).



I briefly referred to the possible negative impact of the Rome Statute and the mandate of the ICC on accountability mechanisms other than trials. Social scientists have criticised this legalistic view on conflict resolution, calling for a radical reconceptualisation of the notion of ‘accountability’ to move beyond the narrow deployment of the term as synonymous with criminal trials.<sup>93</sup>

A growing body of specialised conventions and case law of treaty supervisory bodies such as the Inter-American Court and Commission on Human Rights and the UN Human Rights Committee impose a duty on states to prosecute individuals for certain crimes (such as genocide, war crimes, torture and disappearances). However, many cases reported in Kritz’s *Transnational Justice* suggest that (newly established or transitional) governments are unwilling to respect these duties for a variety of reasons (concern for national reconciliation or fear of upsetting prior government connected fractions). Equally significant is a lack of state-to-state pressure. Ratner also makes a point of the lack of a clear well-defined international law duty to prosecute these crimes: there might be extended jurisdiction to act, but this does not strictly impose a legal duty to act.<sup>94</sup>

#### XI. PARTICIPATION (THE THIRD GOVERNANCE PRINCIPLE)

Of the three governance concepts with which this chapter is concerned, participation is the least compelling or absolute,<sup>95</sup> although its democratic undertone is intuitively seductive. Like transparency, it is instrumental in bringing about accountability. There is a thin line between accountability and participation, but they can be distinguished analytically: accountability is by definition retrospective, while participation is a mechanism to provide proactive input in policy processes.<sup>96</sup>

In good governance literature, participation is usually understood as the idea that citizens must be more systematically involved in the drafting and implementation of policies.<sup>97</sup> Transparency and openness can make more participation by the public possible, assuming that citizens have the opportunity to make known and publicly exchange views, that there is an open,

<sup>93</sup> Kotiswaran and Palmer (n 4) 65, with reference to L Mallinder and K McEvoy, ‘Rethinking Amnesties: Atrocity, Accountability and Impunity in Post-conflict Societies’ (2011) 6 *Contemporary Social Science: Journal of the Academy of Social Science* 107.

<sup>94</sup> Ratner, ‘Judging the Past’ (1998) 417.

<sup>95</sup> See the *when less (participation) is more* message in N Molenaers and R Renard, ‘The Trouble with Participation: Assessing the New Aid Paradigm’ in M Kremer, P van Lieshout and R Went (eds), *Doing Good or Doing Better: Development Policies in a Globalizing World* (Amsterdam, Amsterdam University Press, 2009) 271–73.

<sup>96</sup> Bovens (n 72) 453.

<sup>97</sup> Communication from the Commission of 25 July 2001 ‘European Governance—A White Paper’, COM(2001) 428 final, OJ C 287 of 12 October 2001.

transparent and regular dialogue with the public or that broad consultations are carried out and citizen's initiatives are taken seriously.<sup>98</sup> Participation is seen as one of the four distinct procedural justice principles when dealing with citizens (others are neutrality, respect and trust).<sup>99</sup> The benefits are enormous in terms of satisfaction, compliance and legitimacy: if people have the opportunity to tell their side of the story before decisions are made and feel that what they say is being considered, this positively affects their experience with the legal system, irrespective of the outcome, assuming that the decision was properly communicated (ie, in the case of an unfavourable outcome, that the decision-maker communicates that citizens' views were taken into account, but unfortunately could not influence the decision).

The foregoing concerns the participation of the public, but that does not exhaust the idea of participation. Like other governance principles, participation can be modulated towards different sectors and applied very narrowly (only involving some stakeholders) or widened through mechanisms of consultation, notice, comment and hearings. Involving the public is one option, but is not necessarily mandatory.<sup>100</sup> Inspiration for modelling the kind of participation one seeks for actors at the global level can be found in domestic law, but this is only a source of inspiration.<sup>101</sup> The deep level of interdependency in nation states is not always reached in the global sphere, and giving *all* people equal rights to participation even in matters that impact more on some than on others seems unjustifiable.<sup>102</sup> It might also sometimes be preferable not to insist on civil society participation at the global level, especially when dealing with countries that have a poor track record on civil liberties, where no genuine freedom for civil society groups can be expected.<sup>103</sup>

Governance literature has produced a wealth of valuable insights on concepts of participation, sometimes conflicting but always such as to make us cautious when advocating participation. For instance, we have been alerted to be sensitive to the right 'process moment' in the policy-making cycle (formulation, decision-making, implementation and evaluation) for incorporating participation. We learn that involving citizens and experts in investigating and questioning evidence and information has a greater effect on the preferences of participants than involving them in the final stages. Participation can also serve to increase awareness of options and

<sup>98</sup> Alemanno (n 43) 82.

<sup>99</sup> Tyler, *Procedural Justice* (2007–08) 30; TR Tyler, *Why People Obey the Law* (Princeton, Princeton University Press, 2006) 119; Brems and Lavrysen, 'Procedural Justice' (2013) 181.

<sup>100</sup> Other formats of participation, not focusing on the public, are administrative participation and right-based participation. See on this Alemanno (n 43) 82.

<sup>101</sup> Rached (n 28) 361.

<sup>102</sup> cf Reglitz, 'Political Legitimacy' (2015) 305.

<sup>103</sup> Molenaers and Renard, 'The Trouble' (2009) 271.

perspectives and to overcome biases.<sup>104</sup> Commonly it is felt that participation is not to be used as a decision-making procedure.<sup>105</sup>

It is important to avoid naivety, with its tendency to produce depoliticised analysis and prescriptions. States are seldom neutral and it would be ‘angelical’ to assume that they are sufficiently so in important matters that affect their interests. Similarly, civil society is not a plus in all respects. An angelical perspective of civil society ignores that it is by its very nature heterogeneous, organised around the interests and common perceptions of participants, with collective self-interest playing a major role.<sup>106</sup> There is also selection bias in the stakeholders invited to participate, possible resulting in externally funded NGOs dominating the negotiation spaces (and the absence of smaller local NGOs), and avoidance of involvement of more dissident voices, leading to pro-government selection bias in terms of who gets invited.<sup>107</sup> Finally, given the emphasis in contemporary governance on ad hoc expert groups, transparency and participation may clash, with the drive for transparency leading to information-sharing among (some) policy actors and thereby running the risk of making these deliberations non-public: paradoxically, the drive for transparency might render public administration less accountable in a democratic sense.<sup>108</sup>

## XII. PARTICIPATION IN GLOBAL CRIMINAL LAW: A SIDE DISH?

The participation concept usefully brings to light the political dimension of global criminal law: the question *who sits at the table* enriches the typical depoliticised lawyers view on treaties and norms, and reconnects with basic social science insights on governance. A recurrent theme in Boister’s handling of transnational criminal law is ‘norm entrepreneurialism’, by which (usually powerful) states export their domestic criminal laws into the international realm.<sup>109</sup> The analysis helps to remind us of the ‘messy political nature of reality’.<sup>110</sup> Boister seems to believe that reality is less messy with

<sup>104</sup> More fundamentally, participation can help solve the hermeneutic problem discussed above: there might not be a *common* understanding of principles, but through participation (talking to each other), it is possible to construct in a given case a *shared* understanding of ‘principles’, concepts, terms and nouns in general.

<sup>105</sup> RE Goodin, *Innovating Democracy: Democratic Theory and Practice after the Deliberative Turn* (Oxford, Oxford University Press, 2008) 108–24. See also the book review by B Saunders, ‘Democracy after Deliberation’ (2009) 15 *Res Publica* 315.

<sup>106</sup> Molenaers and Renard (n 95) 255 and 261–63.

<sup>107</sup> *ibid* 273.

<sup>108</sup> *cf* Erkkilä (n 40) 21.

<sup>109</sup> See, for instance, Boister (n 3) 11; and N Boister, ‘Transnational Criminal Law?’ (2003) 14 *European Journal of International Law* 953, 965.

<sup>110</sup> Molenaers and Renard (n 95) 260, with reference to the work of Driscoll and Evans (2005); Eberlei (2007); and Siebold (2007).

regard to classical international criminal law where states participate and engage with each other with a higher moral aim to protect basic common values, as opposed to transnational treaty drafting, where states are driven by specific individualised state interests. Kotiswaran and Palmer elegantly narrow this distinction in terms of the way in which treaties are negotiated by pointing to many self-interested moves by those present at the moment of negotiating the Rome Statute.<sup>111</sup> The ICC is a good test case when it comes to participation. Already during the Rome Conference, a panoply of state delegates, NGO representatives and academics participated in drafting the Statute. The democratic character of these participations is questionable, given that none of them was elected to draft the most important international criminal law bill up to date. Immi Tallgren, for instance, held that 'any democratic control ... will at best be retroactive, at the point of ratification'.<sup>112</sup>

Within the criminal law system, Brants, Mevis and Prakken understand *participation* as participation of the accused and of the public, but also of the victim and other private persons (investigators, consultants, experts etc) in criminal proceedings.<sup>113</sup> Brems and Lavrysen show how participation has been picked up by the ECtHR as a right to participate effectively in a (fair) trial and a right to be involved in investigations on, and decisions about, the rights to life, integrity, privacy and family life.<sup>114</sup> Part of the current development towards the recognition of victim rights has most definitely been co-triggered by this Court.

Moffett's study on victim rights before the ICC recalls the history of the growing recognition of victim interests in international criminal law and rightly welcomes the participatory rights attributed to victims under Article 68(3) of the Rome Statute.<sup>115</sup> Having struck the balance exceptionally well between sympathies for victims and the understanding that many other interests are also at play in criminal law, Moffett outlines the benefits of victim participation and the need to balance this with other interests and the purpose of international criminal justice and its dominant retributive focus.<sup>116</sup> One of the tensions concerns conflicting interests of parties involved, not only those of the defence, but also of the Prosecutor in determining the selection of charges.<sup>117</sup> Within the existing framework, Moffett

<sup>111</sup> See Kotiswaran and Palmer (n 4) 70, with an analysis of feminist strategies to obtain sex crime incriminations with a very broad scope going beyond liberal criminal understandings in most Western states.

<sup>112</sup> I Tallgren, 'We Did it? The Vertigo of Law and Everyday Life at the Diplomatic Conference on the Establishment of an International Criminal Court' (1999) 12 *European Journal of International Law* 683, 685.

<sup>113</sup> Brants, Mevis and Prakken (n 23) 7–8.

<sup>114</sup> Brems and Lavrysen (n 52) 189–200.

<sup>115</sup> Moffett, 'Meaningful and Effective?' (2015) 255–89.

<sup>116</sup> *ibid* 259–61.

<sup>117</sup> *ibid* 264.

tries to make the ICC more victim-oriented (without adopting a restorative justice approach) in the investigation phase, the trial phase and in sentencing proceedings. The *Lubanga* case, with its well-known conflict between the victims and the Prosecutor, has allowed the ICC (and academics like Moffett) to defend more clearly the balance that must be struck in light of the many alternative views on victim participation.<sup>118</sup>

However, there exist less overt contributions to the ICC judicial process by participants not explicitly recognised under the Rome Statute. The Office of the Prosecutor has held consultations with civil society, so-called NGO round tables: 'the Office of the Prosecutor's interaction with local and international NGOs is relevant at all stages of its activities, including development of policies/practices, prevention, promotion of domestic legislation and proceedings, preliminary examination, investigation, prosecution, cooperation, maximizing the impact of its work and its understanding by victims and affected communities'.<sup>119</sup> Furthermore, in 2012, the Office of the Prosecutor appointed three Special Advisers, persons with recognised expertise in their field, who provide advice to the Prosecutor at her request or on their own initiative on training, policies, procedures and legal submissions. More specifically, the Office of the Prosecutor appointed a Special Adviser on International Criminal Law Prosecution Strategies, a Special Adviser on Crimes against Humanity and a Special Adviser on Children in and Affected by Armed Conflict. During the adjudicative process, Amicus Curiae observations are a device by which outside participants such as academics and NGOs can have a say and influence the judicial reasoning.<sup>120</sup>

Another kind of participation is made possible by the principle of complementarity in the ICC Statute and the day-to-day use of hybrid courts. Greater legitimacy, local ownership, a greater connection to victims and capacity-building are among the asserted advantages of hybrid tribunals,<sup>121</sup> and all have to do with bringing in local and domestic law. Much critical legal and empirical research is looking closely at these courts, often with

<sup>118</sup> C Stahn, 'Reparative Justice after the Lubanga Appeals Judgment: New Prospects for Expressivism and Participatory Justice or "Juridified Victimhood" by Other Means?' (2015) 13(4) *Journal of International Criminal Justice* 801.

<sup>119</sup> ICC, Prosecutorial Strategy, 2009-2012, 1 February 2010, available at [www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPPProsecutorial-Strategy20092013.pdf](http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPPProsecutorial-Strategy20092013.pdf).

<sup>120</sup> See, eg, ICC, Situation in the Republic of Côte d'Ivoire, *The Prosecutor v Laurent Gbagbo*, Amicus Curiae Observations of Professors Robinson, de Guzman, Jalloh and Cryer, 9 October 2013.

<sup>121</sup> Williams (n 38) 662. See M Holvoet and P De Hert, 'International Criminal Law as Global Law: An Assessment of the Hybrid Tribunals' (2012) 17(2) *Tilburg Law Review* 228; CPR Romano, A Nollkaemper and JK Kleffner (eds), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford, Oxford University Press, 2004); L Dickinson, 'The Promise of Hybrid Courts' (2003) 97 *American Journal of International Law* 295.

useful recommendations for coping with this prime example of constitutional pluralism, although there is a tendency to require ‘perfect justice’ which fits uneasily with the legal pluralism that such courts embody.

### XIII. A METHOD FOR APPLYING TRANSPARENCY, ACCOUNTABILITY AND PARTICIPATION?

It should by now be obvious that I regard our three concepts as interconnected: transparency should be understood in a holistic and proactive manner, as openness, as only in that form might it actually enable participation, with transparency and participation instrumentally related to accountability. This makes applying transparency, accountability and participation no easy matter, and tensions between the three and between the ends sought with a particular accountability arrangement add to the complexity.

In assessing these interactions and tensions, it is useful to return to Bovens’ ‘why-question’ regarding accountability: *why is accountability important and what is the purpose of the various different forms of accountability?*<sup>122</sup> The answer to this will allow a deeper understanding of the accountability principle, but also of the possible limits to the principles of participation and transparency. Bovens’ grid of (direct) reasons for accountability—democratic control, constitutional or countervailing powers and learning—is particularly useful.<sup>123</sup> It gives three reasons to want accountability and three reasons that might and probably will give way to different governance options about transparency, accountability and participation. It should be noted that the two indirect purposes of accountability—legitimacy and catharsis—are also important in this regard. So, what does one want: *democratic control, constitutional or countervailing powers, learning, legitimacy or catharsis, or a combination of these?*

Whether international organisations need to be accountable not only to states, but also to (global) citizens; whether parliaments need to be built into organisations such as the UN, the Bretton Woods institutions and the World Trade Organization (WTO),<sup>124</sup> whether magistrates need to be involved in truth commissions, how many international judges need to sit in a hybrid court, or whether citizens or domestic judges need to be actively involved in (international) adjudication are all questions that should be answered along these lines. This exercise requires an in-depth comprehension of how human

<sup>122</sup> Bovens (n 72) 462–67.

<sup>123</sup> *ibid* 465.

<sup>124</sup> See Peters (n 29) 265–66 and 279–80. See also RH Weber, ‘The Crucial Triangle: Analysis of the Links between Transparency, Accountability and Participation in the Information Society’ in E Schweighofer, F Kummer and W Hötendorfer (eds), *Transparenz* (Salzburg, IRIS, 2014) 195.



understanding develops in interactions,<sup>125</sup> actors and the institutions they represent,<sup>126</sup> and an awareness that several alternative answers can often be defended. Requiring direct participation by the public everywhere will not do, nor does it correspond to actual practices in transitional justice and the organisation of the criminal law apparatus.

In this context we should recall Rubenstein's beautiful demonstration that the question 'who elected Oxfam?' quite misses the point.<sup>127</sup> This author argues that conceptualising international NGOs as representation bodies is far from flawless and that when it comes to NGOs, the onus should be on the constitutional, countervailing perspective.<sup>128</sup> This does not exclude arrangements that take other perspectives into account, but it does make us understand the actual and possible limits to the idea of representation in the area of global criminal justice: the democratic perspective is one of the perspectives that, depending on the context, need or need not be emphasised.

#### XIV. CONCLUSIONS

In this chapter I defined global criminal law as a paradigm for understanding developments of criminal law affected by globalisation that seeks to go beyond international criminal law *strictu senso* and its fix on adjudication by international tribunals, and transitional justice's focus on treaty-making. There is simply more happening than international courts judging cases and active states exporting criminal law choices via treaties. Welcome to the world of political solutions to crimes, of non-legal responses, of policy-making by judges, prosecutors and national and international NGOs.

Rather than a constitutionalist programme for global criminal law with substantive principles,<sup>129</sup> my ideas are partly driven by a certain cynicism about principled approaches to (criminal) law, especially when they are substantively oriented and rigidly presented as fact. I therefore turned to the Global Administrative Law project (2005) and the proposals by Brants et al

<sup>125</sup> While participation can increase awareness about options and overcome biases. Goodin shows that discussion and participation, especially in the early stages of a discovery process, unduly influence the later course of discussion, producing path-dependent results (Goodin, *Innovating Democracy* (2008) 111–14).

<sup>126</sup> For a conceptual analysis of representation, see JC Rubenstein, 'The Misuse of Power, Not Bad Representation: Why it is Beside the Point that No One Elected Oxfam' (2014) 22(2) *Journal of Political Philosophy* 204, 210–23. See also on this 'boundary problem' in democratic theory Goodin (n 105) ch 7; RE Goodin, 'Enfranchising All Affected Interests, and its Alternatives' (2007) 35 *Philosophy and Public Affairs* 40.

<sup>127</sup> Rubenstein, 'The Misuse of Power' (2014) 204–23. Equally missing the point is Anne Peters' remark that 'contrary to popular opinion, international organisations are relatively accountable in comparison to transnational corporations and non-governmental organisations' (Peters (n 29) 265).

<sup>128</sup> *cf* Rubenstein (n 126) 218.

<sup>129</sup> Höffe (n 14) 262–68.

in 2001 for more procedurally oriented guidelines or principles to address issues of globalisation, in particular transparency, accountability and participation. The role and weight of these flexible, process-oriented principles need to be grasped and adjusted to the context of each actor and their respective purpose and power. Domestic law, including constitutional law, may be a rich source of inspiration, but, from a pluralist, comparative and multi-stakeholder perspective, does not deliver definitive answers.

I have discussed the application and understanding of transparency, participation and accountability in the administration of global criminal justice. At first sight, there seems to be no objection to applying these principles to actors and problems of global criminal justice. There is often a 'gut feeling' that these principles need to be there somehow, which accounts for a 'situation of presence': there is already often some transparency, an accountability arrangement, some way of participating in policy-impacting decisions, either by public actors or by private actors exercising some form of quasi-governmental power.

This chapter has illustrated thin and thick applications of the three principles, identifying among other things *openness* as a thick version of transparency and defending imperfect arrangements of accounting as forms of *accountability*. None of the principles comes to us as absolute. In particular, transparency serves broader values, such as accountability and participation; full transparency is not always required and is therefore not an absolute value or principle (a good per se).

The three principles usually reinforce each other, but might show internal tensions. A mandatory process of legal accountability via courts can block democratic processes in transitional states. There are many more tensions that need to be taken into consideration. Borrowing Bovens' analytical grid about the threefold direct rationales of accountability (democratic, constitutional and learning), complemented by two additional indirect rationales (legitimacy and catharsis), I hope to have shown that the application of governance principles may be good from one perspective and less ideal from another, and that we should not ignore a constitutional perspective on legal and non-legal developments in the area of global criminal law.

## REFERENCES

- Aas, KF, *Globalization and Crime* (Los Angeles, Sage, 2007).  
Alemanno, A, 'Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy' (2014) 39(1) *European Law Review* 72–90.  
Ashworth, A, 'Is the Criminal Law a Lost Cause?' (2000) 116 *Law Quarterly Review* 225–56.  
Bakir, V and McStay, A, 'Assessing Interdisciplinary Academic and Multi-stakeholder Positions on Transparency in the Post-Snowden Leak Era' (2015) 12(3–4) *Ethical Space: The International Journal of Communication Ethics* 25–38.

- Berman, PS, *Global Legal Pluralism: A Jurisprudence of Law beyond Borders* (New York, Cambridge University Press, 2012).
- Bisset, A, *Truth Commissions and Criminal Courts* (Cambridge, Cambridge University Press, 2014).
- Boister, N, 'Transnational Criminal Law?' (2003) 14 *European Journal of International Law* 953–76.
- . *An Introduction to Transnational Criminal Law* (Oxford, Oxford University Press, 2012).
- . 'Reflections on the Concept of Transnational Criminal Law' (2015) 6(10 *Transnational Legal Theory* 9–30.
- Bovens, M, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13(4) *European Law Journal* 447–68.
- Brants, CH, Mevis, PAM and Prakken E (eds), *Legitieme strafvordering. Rechten van de mens als inspiratie in de 21ste eeuw* (Antwerp, Intersentia, 2001).
- Brown, RL, 'Accountability, Liberty, and the Constitution' (1998) 98 *Columbia Law Review* 531–79.
- Ciorciari, JD and Heindel, A, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia* (Ann Arbor, Michigan University Press, 2014).
- Crook, T, 'Useful Idiots or Big Brother's Antidote? Analysing the Ethical Role of the State, *Guardian* and Edward Snowden in the Controversy over Surveillance and Whistle-Blowing' (2015) 12(3–4) *Ethical Space. The International Journal of Communication Ethics* 14–24.
- Cryer, R, Friman, H, Robinson, D and Wilmshurst, E, *An Introduction to International Criminal Law and Procedure* (Cambridge, Cambridge University Press, 2007).
- De Hert, P and Kopcheva M, 'International Mutual Legal Assistance in Criminal Law Made Redundant: A Comment on the Belgian Yahoo! Case' (2011) 27(30 *Computer Law & Security Review* 291–97.
- De Serpa Soares, M, 'An Age of Accountability' (2015) 13(4) *Journal of International Criminal Justice* 669–76.
- Dickinson, L, 'The Promise of Hybrid Courts' (2003) 97 *American Journal of International Law* 295–310.
- Dubnick, M, 'Accountability and Ethics: Reconsidering the Relationships' (2003) 6(3) *International Journal of Organization Theory and Behavior* 405–41.
- Duff, RA, *Answering for Crime* (Oxford, Hart Publishing, 2007).
- Erkkilä, T, *Government Transparency. Impacts and Unintended Consequences* (Basingstoke, Palgrave Macmillan, 2012).
- Foffani, L, 'Il Manifesto sulla Politica Criminale Europea' (2010) *Criminalia* 657–71.
- Goodin, RE, 'Enfranchising All Affected Interests, and its Alternatives' (2007) 35 *Philosophy and Public Affairs* 40–68.
- . *Innovating Democracy: Democratic Theory and Practice after the Deliberative Turn* (Oxford, Oxford University Press, 2008).
- Harlow, C, *Accountability in the European Union* (Oxford, Oxford University Press, 2002).
- Höffe, O, *Democracy in an Age of Globalisation* (Dordrecht, Springer, 2007).
- Holvoet, M and De Hert, P, 'International Criminal Law as Global Law: An Assessment of the Hybrid Tribunals' (2012) 17(2) *Tilburg Law Review* 228–40.

- Holvoet, M and Mema, M, 'The International Criminal Court and the Responsibility to Protect' in D Fiott and J Koops (eds), *The Responsibility to Protect and the Third Pillar: Legitimacy and Operationalization* (Basingstoke, Palgrave Macmillan, 2014) 21–38.
- Horder, J, 'Bureaucratic "Criminal" Law: Too Much of a Bad Thing?', *LSE Law, Society and Economy Working Papers* 1/2014.
- Husak, D, *Over-criminalisation* (Oxford, Oxford University Press, 2008).
- International Law Association, *Final Conference Report: Accountability of International Organisations* (International Law Association, 2004).
- Kaiafa-Gbandis, M, 'The Importance of Core Principles of Substantive Criminal Law for a European Criminal Policy Respecting Fundamental Rights and the Rule of Law' (2011) 1(1) *European Criminal Law Review* 6–33.
- Katzman, R, 'The Non-disclosure of Confidential Exculpatory Evidence and the Lubanga Proceedings: How the ICC Defense System Affects the Accused's Right to a Fair Trial' (2009) 8 *Northwestern Journal of International Human Rights* 77–101.
- Kelsall, T, *Culture under Cross-examination: International Justice and the Special Court for Sierra Leone* (Cambridge, Cambridge University Press, 2009).
- Kessler, O and Werner, W, 'Extrajudicial Killing as Risk Management' (2008) 39(2–3) *Security Dialogue* 289–308.
- Kingsbury, B, Krisch, N and Stewart RB, 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15–61.
- Kotecha, B, 'Book Review of Alison Bisset, Truth Commissions and Criminal Courts (Cambridge University Press, 2014)' (2015) 3 *Journal of International Criminal Justice* 409–18.
- Kotiswaran, P and Palmer, N, 'Rethinking the "International Law of Crime": Provocations from Transnational Legal Studies' (2015) 6(1) *Transnational Legal Theory* 55–88.
- Krisch, N, 'Global Administrative Law and the Constitutional Ambition' in P Dobner and M Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford, Oxford University Press, 2010) 245–66.
- Kritz, N (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Washington DC, United States Institute of Peace Press, 1995).
- Lashmar, P, 'Spies and Journalists: Towards an Ethical Framework?' (2015) 12(3–4) *Ethical Space. The International Journal of Communication Ethics* 4–14.
- Lenaerts, K and Gutiérrez-Fons, JA, 'The Constitutional Allocation of Powers and General Principles of EU Law' (2010) 47(6) *Common Market Law Review* 1629–69.
- Mallinder, L and McEvoy, K, 'Rethinking Amnesties: Atrocity, Accountability and Impunity in Post-conflict Societies' (2011) 6 *Contemporary Social Science: Journal of the Academy of Social Science* 107–28.
- Massé, M, Jean, JP and Giudicielli, A (eds), *Un droit pénal postmoderne ? Mise en perspective des évolutions et ruptures contemporaines* (Paris, PUF, 2009).
- Moffett, L, 'Meaningful and Effective? Considering Victims' Interests through Participation at the International Criminal Court' (2015) 26(2) *Criminal Law Forum* 255–89.
- Molenaers, N and Renard, R, 'The Trouble with Participation: Assessing the New Aid Paradigm' in M Kremer, P van Lieshout and R Went (eds), *Doing Good or Doing Better: Development Policies in a Globalizing World* (Amsterdam, Amsterdam University Press, 2009) 255–78.

- Mulgan, R, 'Accountability: An Ever-Expanding Concept?' (2000) 78 *Public Administration* 555–73.
- Olasolo, H (ed), *Essays on International Criminal Justice* (Oxford: Hart Publishing, 2012).
- Peters, A, 'The Constitutionalisation of International Organisations' in N Walker, J Shaw and S Tierney (eds), *Europe's Constitutional Mosaic* (Oxford, Hart Publishing, 2011) 253–86.
- Rached, DH, 'Doomed Aspiration of Pure Instrumentality: Global Administrative Law and Accountability' (2014) 3 *Global Constitutionalism* 338–72.
- Ratner, SR, 'Judging the Past: State Practice and the Law of Accountability' (1998) 9 *European Journal of International Law* 412–20.
- Recalde, A, 'Transparencia y autonomía del mercado: principios inspiradores de la regulación financiera antes de la crisis' in RG Macho (ed), *Ordenación y transparencia económica en el derecho público y privado* (Madrid, Marcial Pons, 2014) 55–76.
- Reglitz, M, 'Political Legitimacy without a (Claim-)Right to Rule' (2015) 21 *Res Publica* 291–307.
- Romano, CPR, Nollkaemper, A and Kleffner, JK (eds), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford, Oxford University Press, 2004).
- Rubenstein, JC, 'The Misuse of Power, Not Bad Representation: Why it is Beside the Point that No One Elected Oxfam' (2014) 22(2) *Journal of Political Philosophy* 204–23.
- Saunders, B, 'Democracy after Deliberation' (2009) 15 *Res Publica* 315–19.
- Schiff, BP, *Global Legal Pluralism: A Jurisprudence of Law beyond Borders* (New York, Cambridge University Press, 2012).
- Schotsmans, M, 'Blow Your Mind and Cool Your Heart: Can Traditional Based Justice Fill the Transitional Justice Gap in Sierra Leone?' in N Palmer, P Clark and D Granville (eds), *Critical Perspectives in Transitional Justice* (Brussels, Intersentia, 2011) 263–87.
- Simester, AP and von Hirsch, A, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Oxford, Hart Publishing, 2011).
- Somek, A, 'The Concept of "Law" in Global Administrative Law: A Reply to Benedict Kingsbury' (2009) 20(4) *European Journal of International Law* 985–95.
- Spahiu, I, 'Courts: An Effective Venue to Promote Government Transparency? The Case of the Court of Justice of the European Union' (2015) 80 *Utrecht Journal of International and European Law* 5–24.
- Stahn, C, 'Complementarity: A Tale of Two Notions' (2008) 19 *Criminal Law Forum* 87–113.
- . 'Reparative Justice after the Lubanga Appeals Judgment: New Prospects for Expressivism and Participatory Justice or "Juridified Victimhood" by Other Means?' (2015) 13(4) *Journal of International Criminal Justice* 801–13.
- Tallgren, I, 'We Did it? The Vertigo of Law and Everyday Life at the Diplomatic Conference on the Establishment of an International Criminal Court' (1999) 12 *European Journal of International Law* 683–707.
- Tyler, TR, 'Procedural Justice and the Courts' (2007–08) 44 *Court Review* 26–31.
- Tzanakopoulos, A, 'Strengthening Security Council Accountability for Sanctions: The Role of International Responsibility' (2014) *Journal of Conflict & Security Law* 1–18.



- Van de Kerchove, M, 'Le principe de subsidiarité' in A Giudicielli-Delage and C Lazerges (eds), *Le Droit Pénal de l'Union Européenne au Lendemain du Traité de Lisbonne* (Paris, Société de Législation Comparée, 2012) 27–47.
- Vázquez, JB, 'La transparencia: cuando los sujetos privados desarrollan actividades regulatorias' in RG Macho (ed), *Ordenación y transparencia económica en el derecho público y privado* (Madrid, Marcial Pons, 2014) 77–124.
- Von Bogdandy, A, 'Constitutional Principles' in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (2006, Oxford, Hart Publishing) 3–52.
- Walker, N, *Intimations of Global Law* (Cambridge, Cambridge University Press, 2015).
- Weber, RH, 'The Crucial Triangle: Analysis of the Links between Transparency, Accountability and Participation in the Information Society' in E Schweighofer, F Kummer and W Hötendorfer (eds), *Transparenz* (Salzburg, IRIS, 2014) 187–96.
- Whiting, A, 'Lead Evidence and Discovery before the International Criminal Court: The Lubanga Case' (2009) 14 *UCLA Journal of International Law and Foreign Affairs* 207–34.
- Williams, S, 'Review of John D. Ciorciari and Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia* (Michigan University Press, 2014)' (2015) 13 *Journal of International Criminal Justice* 660.



